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Attorneys for Plaintiff and Judgment Creditor
DONALD THORN

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SANTA ROSA DIVISION

In re: Case No.: 13-10923-AJ-7

Javier Agosto and Heidi Erica Alvarez A.P. No.: 13-01103

Debtors./

Donald Thorn

Plaintiff,

v.

Javier Agosto and Heidi Erica Alvarez

Defendants./

**PLAINTIFF DONALD THORN'S REPLY
TO DEFENDANTS' OPPOSITION TO
THE UNDISPUTED MATERIAL FACTS
IN SUPPORT OF HIS SUMMARY
JUDGMENT MOTION**

Date: April 4, 2014

Time: 9:00 a.m.

**Place: 99 South E Street
Santa Rosa, California**

A.P. Filed: August 6, 2013

Trial Date: September 17, 2014

Judge: Alan Jaroslovsky

Plaintiff Donald Thorn submits the following reply to defendants' opposition to his
separate statement of undisputed material facts and supporting evidence in support of his
summary judgment motion, pursuant to California Code of Civil Procedure § 437c, subd. (b).

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Issue 1 – THE AMENDED JUDGMENT ENTERED BY THE SUPERIOR COURT IS NOT DISCHARGEABLE IN BANKRUPTCY

Defendants' Response, Objections, and Evidence Supporting Contention that this Fact is Disputed:	Moving Party's Reply and Supporting Evidence:
1. <u>Undisputed.</u>	<p>1. Donald Thorn was awarded \$36,829.98 on June 22, 2012 in Sonoma County Superior Court in case number SCV-246852 against Javier Augusto Alvarez and Heidi Erica Alvarez, jointly and severally, for breach of contract, conversion/interference with property (an intentional tort), negligence, common counts and injunctive relief with respect to their conversion of Donald Thorn's assets.</p> <p><u>Evidence in Support of Summary Judgment Motion:</u> Exhibit "1" to the accompanying declaration of Edward McCutchan in support of Donald Thorn's motion for summary judgment; August 5, 2013 Adversary Complaint case number 13-01103.</p>
2. <u>Undisputed.</u>	<p>2. The Amended Judgment in Sonoma County Superior Court case number SCV-246852 entered on October 10, 2012 awarded plaintiff Donald Thorn \$30,000.00 in attorney's fees against defendants Javier Augusto Alvarez and Heidi Erica Alvarez under Civil Code § 3426 et seq. (California's Uniform Trade Secrets Act)</p> <p><u>Evidence in Support of Summary Judgment Motion:</u> The October 10, 2012 order states that plaintiff is also awarded \$30,000 in attorney's fees against Javier Augusto Alvarez and Heidi Alvarez under California's Uniform Trade Secrets Act. (Civil Code § 3426 et seq.)</p>
3. <u>Disputed.</u> The fact asserted by Plaintiff is inaccurate as the Amended Judgment only shows that the Court found that "defendants intentionally and purposefully took plaintiff Donald Thorn's client list..." No where /sic/ in the Court's judgment did it find that Defendants acted with willful and malicious	<p>3. This is inaccurate: See June 8, 2012 judgment, October 10, 2012 amended judgment, notice of motion for attorney's fees under Civil Code § 3426.4 and memorandum of points and authorities in support of an award of attorney's fees under Civil Code § 3426.4 by plaintiff Donald Thorn in Sonoma County</p>

1 intent to cause injury to Plaintiff as required
2 under 11 U.S.C. § 523(c). Furthermore, the
3 Court's judgment was delivered NOT after a
4 full litigated trial but by way of a judgment on
5 the pleadings resulting because of Defendants'
6 mistake in responding to Plaintiff's Requests
7 for Admissions. Therefore, the Court received
8 and heard no evidence in regards to Defendants
conduct and therefore made no actual finding
regarding the issue of willful and malicious
intent as it applies to nondischargeability in
bankruptcy court.

9 Furthermore, the asserted fact lacks foundation
10 and is hearsay. (California Evidence Code
11 Section 1200 et seq.) Additionally, Defendants
12 have not received Plaintiffs' responses to
discovery on this issue.

13 Evidence: Defendants ask that the Court take
14 judicial notice of all papers, pleadings and
15 argument in the underlying Civil Court case
16 hereinafter Sonoma County Superior Court
17 case number SCV-246852, and specifically
page 3, paragraph 2 of the Amended Judgment,
filed 10/10/2012. Also, see the declarations of
Defendants.

18 4. Disputed. The fact asserted by Plaintiff is
19 disputed because Defendants' answers to
20 Plaintiff's complaint reveals that the State
21 Court made no finding regarding willful and
22 malicious intent nor did the State Court
23 consider evidence regarding the issue of willful
24 and malicious intent. The finding that a
25 intentional tort was committed is not sufficient
26 for a finding of nondischargeability under 11
27 U.S.C. § 523(c). Furthermore, the imposition
28 of the attorney's fees as relied upon by Plaintiff
in In re Lopez (2007) 367 B.R. 99 does not in
and of itself constitute a finding of willful and
malicious intent under 11 U.S.C. § 523(c). In
re Lopez is distinguishable from the present
matter for the reasons outlined in Defendants'
Opposition to Plaintiff's Motion for Summary

Superior Court case number SCV-246852.

4. This is inaccurate: See June 8, 2012
judgment, October 10, 2012 amended
judgment, notice of motion for attorney's fees
under Civil Code § 3426.4 and memorandum
of points and authorities in support of an award
of attorney's fees under Civil Code § 3426.4
by plaintiff Donald Thorn in Sonoma County
Superior Court case number SCV-246852.

Judgment.

Evidence: Defendants ask that the Court take judicial notice of all papers, pleadings and argument in the underlying Civil Court case hereinafter Sonoma County case number SCV-246852, and specifically page 3, paragraph 2 of the Amended Judgment, filed 10/10/2012. Also, see the declarations of Defendants.

Additional Undisputed Material Facts:

Defendants Contend the Following Material Facts are Undisputed:

1. It is undisputed that the State Trial Court in the underlying civil action relied upon by Plaintiff did not receive any evidence regarding the issue of willful and malicious intent to cause injury to Plaintiff.

2. It is undisputed that the State Trial Court judgment in the underlying civil action did not resolve after a full trial on the merits but rather by way of a judgment on the pleadings due to Defendants' mistake in responding to Requests for Admissions.

3. It is undisputed that the State Trial Court judgment in the underlying civil action held only that Defendants "...intentionally and purposefully took plaintiff Donald Thorn's client list..."

Moving Party's Response and Supporting Evidence:

1. Disputed.

Evidence: See June 8, 2012 judgment, October 10, 2012 amended judgment, notice of motion for attorney's fees under Civil Code § 3426.4 and memorandum of points and authorities in support of an award of attorney's fees under Civil Code § 3426.4 by plaintiff Donald Thorn in Sonoma County Superior Court case number SCV-246852.

2. Disputed.

Evidence: See June 8, 2012 judgment, October 10, 2012 amended judgment, notice of motion for attorney's fees under Civil Code § 3426.4 and memorandum of points and authorities in support of an award of attorney's fees under Civil Code § 3426.4 by plaintiff Donald Thorn in Sonoma County Superior Court case number SCV-246852.

3. Disputed.

Evidence: See June 8, 2012 judgment, October 10, 2012 amended judgment, notice of motion for attorney's fees under Civil Code § 3426.4 and memorandum of points and authorities in support of an award of attorney's fees under Civil Code § 3426.4 by plaintiff Donald Thorn in Sonoma County Superior Court case number SCV-246852.

1 4. It is undisputed that Defendant Javier
2 Alvarez worked for Plaintiff as a process
3 server and continued working for Plaintiff for
4 free during the month of November 2009.

4. Disputed.

Evidence: Objection. This request is barred by judicial estoppel per the June 8, 2012 judgment and the October 10, 2012 amended judgment awarding attorney's fees in favor of plaintiff and against Javier Augusto Alvarez and Heidi Erica Alvarez under California Civil Code § 3426.4 in Sonoma County Superior Court case number SCV-246852. (See In re Lopez (2007) 367 B.R. 99) The issue in this adversary proceeding is whether or not these two judgments have judicial estoppel effect per plaintiff's motion for summary judgment set for hearing on March 7, 2014.

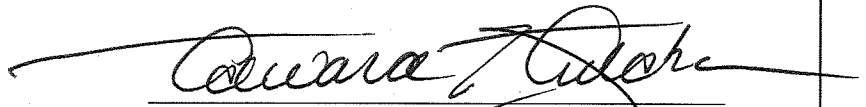
11 5. It is undisputed that Defendant Javier
12 Alvarez and Plaintiff engaged in negotiations
13 regarding the sell /sic/ of Plaintiff's business to
14 Defendants and that Defendant made an initial
15 payment to Plaintiff of \$500.00 for purchase of
16 the business.

5. Disputed.

Evidence: Objection. This request is barred by judicial estoppel per the June 8, 2012 judgment and the October 10, 2012 amended judgment awarding attorney's fees in favor of plaintiff and against Javier Augusto Alvarez and Heidi Erica Alvarez under California Civil Code § 3426.4 in Sonoma County Superior Court case number SCV-246852. (See In re Lopez (2007) 367 B.R. 99) The issue in this adversary proceeding is whether or not these two judgments have judicial estoppel effect per plaintiff's motion for summary judgment set for hearing on March 7, 2014.

21 Date: March 21, 2014

SUNDERLAND | McCUTCHAN, LLP

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24 Edward McCutchan
25 Attorneys for Plaintiff and Judgment Creditor
26 DONALD THORN

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SONOMA

I am employed in the County of Sonoma, State of California. I am over the age of 18 and not a party to the within action; my present address is: 412 Aviation Boulevard, Suite D, Santa Rosa, California 95403.

On March 24, 2014, I served the foregoing document described as **PLAINTIFF DONALD THORN'S REPLY TO DEFENDANTS' OPPOSITION TO THE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT** on the parties by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

XX By Regular U.S. Mail. The documents were placed for collection and mailing following ordinary business practice for deposit in the United States Postal Service in a sealed envelope with postage thereon fully prepaid, addressed as stated above.

___ By personal service. I caused each such envelope to be delivered by hand to the addressee(s) as stated above.

___ By facsimile transmitted from (707) 284-5527. The document transmission was reported as complete and without error.

___ By email or electronic transmission. I caused the document to be sent to the persons at the email addresses listed below. I did not receive within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 24, 2014, at Santa Rosa, California.


Kathleen M. Dahl

In re: Javier Augusto Alvarez, Heidi Erica Alvarez
United States Bankruptcy Court Case No.: 13-10923-AJ-7

Attorneys for Defendants/Debtors: Javier Augusto Alvarez and Heidi Erica Alvarez

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